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4 UNITED STATES DISTRICT COURT  
5 DISTRICT OF NEVADA  
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7 ANTHONY EDWARD PETTY,

Case No. 2:16-cv-02105-RFB-NJK

8 Petitioner,

**ORDER**

9 vs.

10 JO GENTRY, *et al.*,

11 Respondents.  
12

13 This habeas matter under 28 U.S.C. § 2254 comes before the Court on petitioner's  
14 application (ECF No. 1) to proceed *in forma pauperis*, on his motion (ECF No. 3) for  
15 appointment of counsel, and for initial review under Rule 4 of the Rules Governing Section  
16 2254 Cases. Petitioner subsequently paid the filing fee, and the Court therefore will deny the  
17 pauper motion without prejudice as moot and proceed to initial review.

18 Following initial review, it appears that the Court lacks jurisdiction over the petition  
19 because it constitutes a successive petition. Petitioner therefore will be directed to show  
20 cause why the petition should not be dismissed without prejudice for lack of jurisdiction.

21 Petitioner Anthony Edward Petty seeks to set aside his January 8, 2001, Nevada state  
22 judgment of conviction, pursuant to a jury verdict, of first-degree murder with the use of a  
23 deadly weapon. He is serving two consecutive sentences of life with the possibility of parole  
24 after twenty years on each sentence.

25 Petitioner previously sought federal habeas relief in this Court challenging the same  
26 January 8, 2001, judgment of conviction in *Petty v. Schomig*, No. 2:04-cv-00947-RLH-LRL.  
27 The Court dismissed that prior petition on the merits on March 20, 2006, and the Court of  
28 Appeals denied a certificate of appealability on December 26, 2006.

1 Review of the online records of the state district court reflects that there have been no  
2 intervening amended or corrected judgments of conviction filed in that court subsequent to  
3 the January 8, 2001, judgment.<sup>1</sup>

4 Petitioner asserts in response to the pertinent inquiry in the federal petition form that  
5 he has not obtained permission to file a successive petition from the Court of Appeals. (ECF  
6 No. 1-1, at 2.) The claims in the current petition clearly challenge the January 8, 2001,  
7 conviction.

8 Under 28 U.S.C. § 2244(b)(3), before a second or successive petition is filed in the  
9 federal district court, the petitioner must move in the court of appeals for an order authorizing  
10 the district court to consider the petition. A federal district court does not have jurisdiction to  
11 entertain a successive petition absent such permission. *E.g., Burton v. Stewart*, 549 U.S.  
12 147, 149 & 152-53 (2007). In the present petition, petitioner seeks to challenge the same  
13 judgment of conviction that he previously challenged in No. 2:04-cv-00947. The present  
14 petition constitutes a second or successive petition because that prior petition was dismissed  
15 on the merits. *See, e.g., Henderson v. Lampert*, 396 F.3d 1049, 1052-53 (9th Cir. 2005).  
16 Petitioner accordingly must show cause why the petition should not be dismissed for lack of  
17 jurisdiction as a successive petition.

18 Turning to the motion for appointment of counsel, the Sixth Amendment right to  
19 counsel does not apply in habeas corpus actions. *See Knaubert v. Goldsmith*, 791 F.2d 722,  
20 728 (9th Cir. 1986). However, 18 U.S.C. § 3006A(a)(2)(B) authorizes a district court to  
21 appoint counsel to represent a financially eligible habeas petitioner whenever "the court  
22 determines that the interests of justice so require." The decision to appoint counsel lies within  
23 the discretion of the court; and, absent an order for an evidentiary hearing, appointment is

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26 <sup>1</sup>The Court takes judicial notice of its records in the prior action filed in this Court by petitioner as well  
27 as of the online docket records of the Eighth Judicial District Court for the State of Nevada. *See Harris v.*  
28 *County of Orange*, 682 F.3d 1126, 1131-32 (9th Cir. 2012). The online docket records of the state district  
court may be accessed from:

<https://www.clarkcountycourts.us/Anonymous/default.aspx>

1 mandatory only when the circumstances of a particular case indicate that appointed counsel  
2 is necessary to prevent a due process violation. *See, e.g., Chaney v. Lewis*, 801 F.2d 1191,  
3 1196 (9th Cir.1986).

4 The Court does not find that the interests of justice require the appointment of counsel  
5 herein. Petitioner has demonstrated an adequate ability to address the potential issues  
6 presented in this case proceeding in proper person. The Court further is not persuaded that  
7 appointment of counsel is required or warranted for petitioner to respond to the order to show  
8 cause. Petitioner must respond to the show-cause order *pro se* without counsel.

9 IT THEREFORE IS ORDERED that petitioner's application (ECF No. 1) to proceed *in*  
10 *forma pauperis* is DENIED without prejudice as moot following upon petitioner's payment of  
11 the filing fee.

12 IT FURTHER IS ORDERED that petitioner's motion (ECF No. 3) for appointment of  
13 counsel is DENIED.

14 IT FURTHER IS ORDERED that the Clerk of Court shall file the petition<sup>2</sup> and that,  
15 within **sixty (60) days of entry** of this order, petitioner shall SHOW CAUSE in writing why the  
16 petition should not be dismissed for lack of jurisdiction as a successive petition. **If petitioner**  
17 **does not timely respond to this order, the petition will be dismissed as a successive**  
18 **petition without further advance notice.**

19 IT IS FURTHER ORDERED that all assertions of fact made by petitioner in response  
20 to this show-cause order must be detailed, must be specific as to time and place, and must  
21 be supported by competent evidence. The Court will not consider any assertions of fact that  
22 are not specific as to time and place, that are not made pursuant to a declaration under  
23 penalty of perjury based upon personal knowledge, and/or that are not supported by  
24 competent evidence filed by petitioner in the federal record. Petitioner thus must attach copies  
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28 <sup>2</sup>Nothing herein suggests that the current petition is free of other deficiencies, including, but not  
limited to untimeliness under 28 U.S.C. § 2244(d).

1 of all materials upon which he bases his argument that the petition should not be dismissed  
2 as a successive petition. Unsupported assertions of fact will be disregarded.

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4 DATED this 29th day of September, 2017.

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8 RICHARD F. BOULWARE, II  
9 United States District Judge  
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